

BEFORE  
THE PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA  
DOCKET NO. 2017-305-E and 2017-370-E

IN RE:	)	<b>BRIEF OF ATTORNEY</b>
	)	<b>GENERAL ALAN WILSON</b>
	)	
Request of the South Carolina Office of	)	
Regulatory Staff for Rate Relief to	)	
SCE&G Rates Pursuant to	)	
S.C. Code Ann. § 58-27-920	)	
<hr/>	)	

The Attorney General has previously briefed and argued to the Commission that the Base Load Review Act (“BLRA”) is unconstitutional, as applied to SCE&G ratepayers. Particularly, we believe that ratepayers were deprived of their right to procedural due process in the granting of each of the nine revised rate increases authorized by the BLRA. Moreover, we are of the view that § 58-33-275(A) and (B) unconstitutionally deprive ratepayers of the right to challenge prudence and/or that the plants are used and useful after the initial base load review order. See State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) [statute which precludes further challenge of criminal status violates due process]. Further, we contend that the BLRA violates Art. IX, § 1 of the State Constitution because it allows SCE&G to obtain costs and a return for a project it has abandoned; inasmuch as ratepayers received nothing in return for these numerous rate increases, the BLRA does not serve the “public interest,” in contravention of Art. IX, § 1. In support of a conclusion of unconstitutionality as applied, the Attorney General submitted last November an

86 page brief (plus exhibits) in opposition to SCE&G's Motion to Dismiss. The Attorney General himself appeared before the Commission in December of last year and argued the case for the BLRA's violation of due process as applied to SCE&G ratepayers.

We believe that these arguments are sound. They were made in the circuit court litigation prior to the Lightsey Settlement Agreement. Lightsey, et al v. SCE&G, etc, et al., Case No. 2017-CP-25-335. The order of the circuit court preliminarily approving the Settlement Agreement in Lightsey (December 5, 2018) noted that the Court was about to rule on the BLRA when the parties agreed to mediation and began settlement discussions. Thus, the PSC should conclude that SCE&G ratepayers were deprived of their constitutional rights at the hands of the BLRA.

Further, we urge that the Commission possesses broad discretion to fashion a remedy for the BLRA's unconstitutionality as applied. Unlike a court, the PSC cannot, of course, strike down the BLRA, as discussed below. However, the PSC can determine that the BLRA is unconstitutional, as applied to SCE&G ratepayers. We believe that an appropriate remedy for this unconstitutional application is established by the settlement agreement reached between SCE&G, the class action consumers and the State on November 24, 2018 (the "Lightsey Settlement Agreement").<sup>1</sup> In our view, the Lightsey Settlement Agreement would "fairly and

---

<sup>1</sup> The agreement is filed in Docket 2018-376-E. We believe that the Commission may take judicial notice of the Settlement Agreement because it is filed in that docket and in the Court of Common Pleas, but we will certainly submit a copy of it to the Commission upon request. As stated in the Addendum to the Agreement at paragraph 5:

[T]he State maintains that its sole purpose in that forum has been and will continue to be to advise the PSC on issues regarding the BLRA and its constitutional limits. Consistent with that role, the State agrees that the Settlement constitutes an appropriate remedy to any constitutional concerns over the BLRA, and further does not object to the PSC's adoption of prospective customer rates at or below the rates imposed by Act 258, including adoption of

appropriately compensate ratepayers. . . .” (Addendum 1 to Lightsey Settlement Agreement ¶ 5). Thus, the Lightsey Settlement Agreement may serve as the remedy for the constitutional violation.

### **PSC’s Authority Regarding BLRA Unconstitutionality**

It is important to discuss briefly the Commission’s authority to address the constitutionality of statutes. Of course, this Commission possesses no authority to “strike down” the BLRA as a court would or could. See Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue, 342 S.C. 28, 34, 535 S.E.2d 642, 644 (2000). However, the Commission is authorized to address the constitutionality of the BLRA as it is applied to SCE&G ratepayers. In Travelscape, LLC v. S.C. DOR, 391 S.C. 89, 109, 705 S.E.2d 28, 38 (2011), the South Carolina Supreme Court distinguished Video Gaming Consultants and concluded that Dorman v. Dept. Health and Environmental Control, 350 S.C. 159, 171, 565 S.E.2d 119, 126 (Ct. App. 2002) and Ward v. State, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000) struck the correct balance with respect to an administrative agency’s ability to consider constitutional issues. The Supreme Court thus approved the analysis in those cases. }”we find the principle enunciated in Dorman and Ward to be sound. . . .”].

Travelscape quoted Dorman with approval, noting that “[W]hile it is true that AL[C]’s cannot rule on a facial challenge to the constitutionality of a regulation or statute, AL[C]’s can rule on whether a law as applied violates constitutional rights.” Travelscape, 391 S.C. at 109, 705 S.E.2d at 38 (quoting Dorman, 350 S.C. at 171, 565 S.E.2d at 126). In Ward, the Supreme Court had stated that

---

the Joint Applicants’ Customer Benefits Plan B-L, as an appropriate outcome of those proceedings.

ALJ's [cannot] rule on the validity of a statute. However, an agency or ALJ can still rule on whether a party's constitutional rights have been violated. . . . {M}erely asserting an alleged constitutional violation will not allow a party to avoid an administrative ruling.

Ward, 348 S.C. at 18, 538 S.E.2d at 247. See also Evans v. State, 344 S.C. 60, 67, 543 S.E.2d 547, 551 (2004) {"We conclude that DOR has the jurisdiction and authority to rule on State Retirees' constitutional claims." (citing Ward). Thus, the existing precedents strongly support the authority of the PSC to address the issue of whether the BLRA is unconstitutional as applied to SCE&G ratepayers and whether the Act deprives these ratepayers of their constitutional rights. See Doe v. State, 421 S.C. 490, 502, 808 S.E.2d 807, 813-14 (2017) ["finding a statute or regulation unconstitutional as applied to a specific party does not affect the facial validity of that provision." (quoting Travelscape, 391 S.C. at 109, 705 S.E.2d at 39). For the reasons that follow, we contend that the Act deprived SCE&G ratepayers of their constitutional rights.

#### **Arguments Supporting BLRA Unconstitutionality, As Applied**

Last year, we submitted to the Commission a voluminous Brief, detailing the numerous constitutional deficiencies in the BLRA. We summarized these violations as follows:

As we assert in this Brief, the Attorney General strongly believes that the BLRA unconstitutionally deprives SCE&G ratepayers of the right to have utility rates regulated in the "public interest," as well as the right to due process and equal protection. Moreover, the property of SCE&G ratepayers, in the form of excessive rates, has been "taken" without just compensation in violation of the federal and State Constitutions. SCE&G has made clear its intention to abandon these unfinished plants, which have already cost ratepayers billions of dollars and customers are continuing to be charged with no end in sight.

AG's Opposition to SCE&G's Motion to Dismiss, filed November 21, 2017, in 2017-305-E.

We reiterate these legal positions here and incorporate herein that Brief, as well as our September 26, 2017 Opinion, by reference. As we stated in our earlier Brief, from a constitutional standpoint, the BLRA leaves ratepayers holding the bag. As the chief law officer

of the State, who possesses the duty to protect the public interest and the wellbeing of a utility's ratepayers, the Attorney General may assert the constitutional rights of those ratepayers. We have sought to do that before the PSC and urge the Commission to take into account these constitutional principles in setting a final rate.

More specifically, in our view, the revised rates process, as well as § 58-33-275(A) and (B), violate due process as protected by Art. I, § 22 of the State Constitution. Revised rate increases are granted pursuant to the BLRA without sufficient notice and an opportunity to be heard by ratepayers prior to the increase pursuant to § 58-33-280. See Garris v. Governing Bd. of S.C. Reinsurance Facility, 333 S.C. 432, 440, 511 S.E.2d 48, 52 (1999); Stono River Env'tl Prof. Assn. v. S.C. DHEC, 305 S.C. 90, 93, 406 S.E.2d 340, 342 (1991) [Art. I, § 22 requires notice, a hearing and judicial review]; Ross v. Med. Univ. of S.C., 328 S.C. 51, 492 S.E.2d 62 (1997). Further, § 58-33-275(A) mandates that, by operation of law, the base load review order constitutes “a final and binding determination that a plant is used and useful” and that its “capital costs are prudent utility costs” so long as the plant is being constructed within the parameters of the approved schedule and the approved capital costs. Subsection (B) of § 58-33-275 requires that a determination under § 58-33-275(A) may “not be challenged or reopened in any proceeding. . . .”

As we concluded in the Attorney General's Opinion of September 26, 2017, and as we argued in our Brief to this Commission submitted last November, these provisions violate due process under Art. I, § 22. As Justice Hearn wrote for the Supreme Court in South Carolina Energy Users Comm. v. S.C. PSC, 388 S.C. 486, 496, 697 S.E.2d 587, 592 (2010), there is “no mechanism in place [in the BLRA] to challenge the prudence of SCE&G's financial decisions” as a result of § 58-33-275(B). All of these provisions (revised rates and §§ 275(A) and (B))

deprived ratepayers of their constitutional rights protected by Art. I, § 22. Together, these provisions turned out the lights and slammed the door shut on any ratepayer challenges to the nine revised rate increases under the BLRA. Not only could ratepayers not challenge the revised rates themselves (as a result of inadequate notice and opportunity to be heard), but they were precluded from raising prudence or asserting that SCE&G's actions were imprudent. See §§ 58-33-275(A) and (B) and § 58-33-285. All of these constitutional flaws, including the one-sidedness of the BLRA, converged. The financial debacle that is the V.C. Summer project was the result.

Art. I, § 22 provides in pertinent part that “[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency except on due notice and an opportunity to be heard. . . .” This provision is violated because SCE&G ratepayers received only notice by publication prior to the revised rates becoming effective. Moreover, § 58-33-280 allows ratepayers only to submit “written comments” regarding a proposed revised rate increase prior thereto. On its face, this provision specifies no hearing for ratepayers prior to a revised rates increase being ordered by the PSC.

In Kuschner v. City of Planning Comm., 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008), the South Carolina Supreme Court stated the following:

[p]rocedural due process imposes constraints on government decisions of liberty or property interests within the meaning of Due Process Clause of the Fifth or Fourteenth Amendment, of the United States Constitution. Matthews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way and judicial review. S.C. Const. Art. I, § 22; Stono River Protection Assn. v. S.C. Dept. of Health and Env't'l. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991).

Further, “[i]n recognition of the increasing number of governmental powers delegated to administrative agencies, South Carolina Constitution Article I, § 22 was added to the 1895

Constitution in 1970 ‘as a safeguard for the protection of liberty and property of liberty and property of citizens.’” Ross v. Med. Univ. of S.C., 328 S.C. at 56, 492 S.E.2d at 68 (1997) (quoting Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, p. 21 (1969)). Our courts have been vigilant in enforcing Art. I, § 22, separate from the due process clause.

Porter v. S.C. PSC, 338 S.C. 104, 525 S.E.2d 866 (2000) addressed the question of whether utility ratepayers are, prior to a rate increase, entitled to adequate notice and an opportunity to be heard pursuant to Art. I, § 22. In Porter, the Supreme Court faced the issue of whether consumers had received sufficient notice pursuant to § 58-9-530. That statute required that “changes in general schedules of rates and charges” do not become effective until the “proposed changes be given by publication.” 338 S.C. at 169, 525 S.E.2d at 868. While publication notice was given in Porter, such notice did not, according to the Court, provide ratepayers with sufficient information as to what proposed rate changes were being sought by the utility. Thus, ratepayers received no adequate opportunity to be heard in the public hearing held.

Importantly, the Porter Court concluded that, not only was the notice statute not complied with, but that Art. I, § 22 had been violated. According to the Supreme Court, the notice which was actually provided was “not informative and in fact is somewhat misleading. . . .” Thus, the Court concluded that “the rate increases were ordered without adequate notice in violation of due process,” citing Art. I, § 22 in support of that conclusion. 338 S.C. at 169-70, 525 S.E.2d at 869.

In addition, the lack of adequate notice was deemed by the Court in Porter to have imposed “substantial prejudice” upon ratepayers, an element also required by Art. I, § 22. See Tall Tower, Inc. v. S.C. Procurement Review Panel, 294 S.C. 225, 363 S.E.2d 683 (1987) (holding that a due process claim requires a showing of substantial prejudice). In the Supreme

Court's view, "[a]lthough there was no way to determine actual prejudice in the amount of the increases [in rates] ordered, the public was completely deprived of any opportunity to be heard." 338 S.C. at 170, 525 S.E.2d at 869. Although Porter did not squarely face the question of the validity of notice by publication under Art. I, § 22, the Supreme Court clearly emphasized that "[r]ate increases are of primary importance to the public and are the essential reason for requiring notice." 338 S.C. at 168-69, 525 S.E.2d at 868 (emphasis added). Thus, Porter tied the inadequate notice which had been given to ratepayers in that case, to its conclusion that these ratepayers were provided no opportunity to be heard. See Landry v. State, 539 So.2d 612 (Fla. 1989) ["Because appellant had no notice and, therefore, as a logical consequence, no opportunity to be heard, we reverse. . . ."].

Porter is, therefore, highly instructive with respect to this matter before the Commission. While the facts there may have been somewhat different from the revised rate procedure set forth in the BLRA, nevertheless, Porter clearly stands for the proposition that utility ratepayers possess a constitutionally protected interest in the rates they pay. Failure to provide adequate notice, as in Porter, deprives ratepayers of the opportunity to be heard. Customers in South Carolina are thus constitutionally entitled to notice and an opportunity to be heard prior to a utility rate increase.

Particularly persuasive with respect to ratepayer notice is Miss. Power Co., Inc. v. Miss. Pub. Serv. Comm., 168 So.3d 905 (Miss. 2015). There, the Mississippi Supreme Court (en banc) addressed that State's Base Load Review Act in the context of due process for ratepayers. It was argued in Miss. Power that "the assessments (increased rates) ordered by the Commission's actions violate his and others' due process rights." 168 So.3d at 913. The Supreme Court of Mississippi held that "[t]here is no question that the taking of private funds is a transfer of the



property and results in the deprivation of that property.” *Id.* at 914. Under Mississippi law, notice was required to be given customers with respect to a “major” rate increase both by newspaper publication, and by insert in the customer’s bill. However, in the particular instance before the Court, notice was provided only by newspaper publication. The dissent reasoned that such publication notice fully met due process requirements. *Id.* at 928 (Dickinson, J., dissenting). However, the majority of the en banc Court disagreed that notice by newspaper publication satisfied the requirements of due process. The Mississippi Supreme Court used language remarkably similar to the situation here:

Blanton raises his objections, not only for himself, but also for the unnoticed ratepayers. No argument has been advanced that all ratepayers participated in every stage of these proceedings, because it simply is not true. Notice was not properly given. The construction and operation of this multibillion-dollar electric generation facility was going to increase rates. Any suggestion to the contrary is facetious and wholly untenable. Ratepayers first received notice of MPC's intent to increase rates after entry of the April 24, 2012, Order, when an increase in rates was a *fait accompli*. “[A]s a practical matter,” ratepayers should have been provided notice in the initial proceedings in order to protect their “substantial interest . . . [in the] outcome of the proceeding,” and if a ratepayer, after receiving such notice, desired to protect his/her interests, the ratepayer could do so by intervening in the proceedings. See Public Utilities Rules of Practice and Procedure 6.121. Yet ratepayers were not afforded procedural due process via notice.

*Id.* at 914-915 (emphasis added). The en banc Court thus concluded that “[d]irect notice was not provided to a single customer in any of the twenty-three counties served.” *Id.* at 914 (emphasis added). Therefore, the Court held that ratepayers were deprived of procedural due process for want of notice. Compare, Pa. State Univ. v. Pub. Util. Comm., 988 A.2d 771, 782 (Pa. 2010) [“... Allegheny Power provided PSU with adequate notice through its customer bill inserts.”]. In the matter before this Commission, notice was given to SCE&G customers for the revised rate increases only by newspaper publication prior to revised rate increases being ordered. See also State ex rel. Jackson Co. v. Public Serv. Comm., 532 S.W.2d 20, 35 (Mo. 1975 en banc) (Seiler,

C.J., dissenting) [“however, . . . what the consumers are contending here is not that they have the property right in a specific fixed utility rate, but that they have a right to receive notice of any proposed rate increase and to be afforded an opportunity to be heard prior to an increase going into effect. They do not claim the right to a specific rate but they do claim the right to just and reasonable rates which is what is required by the statute.”]; Barasch v. Pa. Pub. Util. Comm., 546 A.2d 1296, 1305 (Pa. 1988) [customers have a “substantial property interest” in “substantial increases in their bills. . . .”]. As in Porter and Miss. Power, such notice is insufficient due process under Art. I, § 22.

A decision of the United States Supreme Court, in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), is also highly persuasive with respect to the fundamental requirement of actual notice rather than notice by publication. Mullane holds that publication notice is not “a reliable means of acquainting interested parties of the fact that their rights are before the courts.” The Court characterized providing notice by publication as “an indirect and even a probably futile means of notification. . . .” *Id.* at 317. In Mullane, the question was the constitutionality of publication in a local newspaper. According to the Supreme Court, the “right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.” 339 U.S. at 314. Notice cannot constitute a “mere gesture” in order to meet the requirements of due process. *Id.* at 315.

According to the Supreme Court in Mullane, “[i]t would be idle to pretend that publication alone, as prescribed here” served as an adequate means of informing persons that proceedings were available to them. Mullane went on to say that “It is not an accident that the greater number of cases reaching this Court, on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers.”

Thus, the Mullane Court concluded that “[w]here the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.” Id. at 318. See also Caldwell v. Wiquist, 402 S.C. 565, 575-76, 741 S.E.2d 583, 589 (Ct. App. 2013) [(“i)f the name and address of an individual is reasonably ascertainable, then notice by publication is insufficient to satisfy due process.”]; United States v. Borromeo, 945 F.2d 750, 752 (4th Cir. 1991) “[service by publication is constitutionally insufficient where a actual notice by mail is feasible.”].

Accordingly, Porter and Mullane, as well as other cases, make clear that, unless the notice is sufficient to satisfy due process, there can be no constitutionally adequate opportunity to be heard. The two prongs – notice and opportunity to be heard – are inextricably bound to one another. See also § 1-23-320(A) [stating that in a “contested case” (including “ratemaking” pursuant to § 1-23-505(3)), all parties are required to be afforded an opportunity for a hearing after paper notice].

### **Lack of Adequate Notice for Revised Rates Process**

We will first examine the question of the adequacy of notice with respect to the nine revised rate increases. As noted, the BLRA’s revised rates process is set forth at §§ 58-33-280 and 58-33-285. On its face, Section 58-33-280 does not contain a provision for any notice to customers of a revised rates increase. However, as indicated above, notice by publication was, in fact, provided to customers in each of the nine revised rate proceedings. Publication notice was all the notice given to SCE&G ratepayers prior to the revised rates increases being ordered by the PSC.

With respect to the opportunity for the customer to be heard, or to challenge the revised rates, Section 58-33-280(C) provides that “[w]ritten comments to the Commission and the Office

of Regulatory Staff concerning the revised rates and the information supporting them shall be allowed within one month of the revised rates filing.” Written comments may again be submitted in response to the report by ORS of its “review and audit” regarding revised rates. §58-33-280(E). Ironically, pursuant to § 58-33-280(H), direct notice is required to be provided to the customer once the revised rate increase has been ordered. In this regard, Section 58-33-280(H) states that if the utility is “granted a rate increase in the revised rates order,” then “the utility shall provide notice to its customers with its next billing.” § 58-33-280(H). Section § 58-33-280(H) further provides that the “utility may implement revised rates for bills rendered on or after the date selected by the utility, which may not be sooner after revised rates are approved.”

In short, pursuant to the revised rates process, which the BLRA and the PSC provided to customers, the ratepayer received notice of the fact that revised rates were being proposed only by newspaper publication. However, each customer was notified “with the next billing” once “the utility [was] granted a rate increase in the revised rates order. . . .” Such a disparity in treatment of ratepayers regarding the form of notice given – notice by publication of a proposed increase, but direct notice of the increase itself – is illogical, and does not comport with Art. I, § 22. See Porter, supra; Miss. Power, supra.

Also pertinent to the revised rates equation is § 58-33-285, which provides for the customer's opportunity for “review” of the revised rates order once it has been issued. Pursuant to § 58-33-285(A), an “aggrieved party” may, within 30 days of the issuance of a revised rates order, petition the PSC “for review of the order. . . .” However, Subsection (E) of § 58-33-285, provides that such filing “must be considered a new proceeding subject to the provisions of Section 58-33-240.” In other words, the BLRA allows the customer in a separate “new”

proceeding to challenge the revised rates only after such rates have already been approved. This “after the fact” or “post deprivation” process is inconsistent with Porter.

While it has been argued by SCE&G that this “post-rate increase” process is adequate, we disagree. Notice by publication prior to the revised rate increases (and only direct notice thereafter) is constitutionally flawed. Such notice is thus in conflict with Art. I, § 22. As the Court recognized in Porter, “[r]ate increases are of primary concern to the public and the essential reason for requiring notice.” 338 S.C. at 168-69, 525 S.E.2d at 868 (emphasis added). Thus, regardless of whether ratepayers are entitled to due process under the federal Constitution, see Holt v. Yonce, 370 F.Supp. 374, (D.S.C. 1973) sum. affd., 415 U.S. 969 (1974), the State Constitution, pursuant to Art. I, § 22, requires adequate notice to ratepayers prior to a rate increase. As our Court of Appeals has recognized, notice by publication “is constitutionally insufficient where actual notice by mail is feasible.” Caldwell v. Wiquist, supra.

The decisions, discussed above, such as Porter, supra, Miss. Power Co., supra, Mullane, supra and Wiquist, supra, regarding the constitutional requirement of adequate notice, each support the principle that ratepayers must be provided “notice reasonably calculated under all circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections.” Miss. Power, 165 So.3d at 913, (quoting Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13 (1978)). These decisions reinforce this Court’s conclusion that notice by publication is not constitutionally adequate in the circumstances here. In our opinion, the BLRA’s notice application to SCE&G ratepayers does not satisfy the requirements of Art. I, § 22. Notice by publication is constitutionally inadequate, particularly when SCE&G provided direct, actual notice to customers by mail in the other instances

discussed above. In short, because of deficient notice, customers were not afforded an “opportunity to present their objections” to revised rate increases.

### **Lack of Opportunity to be Heard**

Similarly, the opportunity for ratepayers to be heard with respect to revised rates is also constitutionally inadequate. The “written comments” provision of § 58-33-280 is particularly flawed. Pursuant to § 58-33-280(C), written comments may be submitted “concerning the revised rates and the information supporting them.” However, due process demands a more meaningful opportunity to be heard with respect to revised rate increases than the submission of “written comments.” Art. I, 22 requires an evidentiary hearing with evidence submitted, cross-examination allowed, and the ability to refute the utility’s presentation concerning revised rates.

The BLRA’s text in § 58-33-280(C) recognizes that revised rates will likely be challenged by customers if such a challenge was meaningful. Subsection (C) of § 58-33-280 employs the language “concerning the revised rates and the information supporting them.” with respect to written comments. However, the BLRA’s limitation to challenge or protest a significant rate increase only by such “written comments” is akin to requiring the ratepayer to contest a revised rate increase with one hand tied behind the back. As the United States Supreme Court held in Goldberg v. Kelly, *supra*, “written submissions do not afford the flexibility of oral presentations; they do not afford the recipient [here, the ratepayer] to mold his argument to the issues the decision maker appears to regard as important. . . . [W]ritten submissions are a wholly unsatisfactory basis for decision.” 397 U.S. at 269.

In Goldberg, the United States Supreme Court addressed the situation in which federal AFDC payments were terminated. The Court concluded that “[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard” and thus “[i]t is not

enough that a welfare recipient may present his position to the decision maker in writing....” 397 U.S. at 268-69. Accordingly, “a recipient must be allowed to state his position orally.” *Id.* at 269. In this instance, SCE&G ratepayers come from all walks of life and all levels of education. Many may not be capable of, or are unwilling to, submit “written comments.” When one combines the BLRA’s allowance of only written comments before rate increases are ordered, – meaning no right to participate – with a deficient notice of the proposed revised rate increases (by newspaper publication only before such increases), the procedural due process offered by the BLRA to the ratepayer is a mere token gesture.

To be sure, § 58-33-285 allows a hearing to any “aggrieved party” to “review” the revised rates ordered and parties may appeal pursuant to 58-33-310. However, a customer has to intervene in a “new proceeding” in order to challenge this rate increase. Moreover, importantly, such a challenge is limited severely as a result of §§ 58-33-275(B) and 58-33-287(B). Prudency may not be questioned, nor may the “intervenor” raise any issue other than administrative. Thus, the post-deprivation hearing, is not a real hearing at all, but a rubber stamp of the revised rates already granted pursuant to § 58-33-280. Accordingly, the right of judicial review, granted by § 58-33-310, is virtually meaningless. As Justice Hearn astutely noted in S.C. Energy Users v. S.C. PSC, *supra*, ratepayers possess “no mechanism in place to challenge the prudency of SCE&G’s financial decision.” See also McIntyre v. SEC Commissioners, 2018 WL 5020070 (Ct. App. 2018) [judicial review did not cure procedural due process violations in that circumstance].

In the McIntyre case, the Court stressed that “[p]rocedural due process insists upon fair play.” *Id.* at \*5. The Court of Appeals addressed the question of whether the Securities Commission “denied [the Appellants] . . . procedural due process by not providing rules for the

hearing procedure.” In concluding that Art. I, § 22 had been violated, the Court distinguished Unisys Corp. v. S.C. Budget & Control Bd., 346 S.C. 158, 551 S.E.2d 263 (2001). McIntyre stated:

[a]s mentioned, Unisys found the lack of procedural safeguards at an administrative hearing was cured by the availability of de novo review by the Procurement Review Panel. Id. at 175, 551 S.E.2d at 272. Two features of the Act prevent this cure from working here. First, rather than de novo review, judicial review of the Commissioner’s ruling is made using the substantial evidence standard, and – importantly – the factual findings of the Commissioner are “conclusive” if supported by competent, material and substantial evidence. S.C. Code Ann. § 35-1-609 (Supp. 2017).

. . . Unlike Unisys, where the internal appeal to the Panel expanded the bidder’s due process and cured its earlier curtailment, the Commissioner’s review diminished Appellants’ right to be heard. By silently reserving the right not only to reject the Hearing Officer’s factual findings and rulings but to make its own findings without notice, hearing, or any further opportunity for input, the Commissioner undermined its own ad hoc procedure. A party is not entitled to a hearing at each stage of agency review, but a meaningful hearing must occur at some stage. See Ross v. Med. Univ. of S.C., 328 S.C. 51, 68-69, 492 S.E.2d 62, 71-72 (1997).

Id. at \*2.

With respect to the revised rates process under consideration here, the absence of due process is more prevalent even than was the case in McIntyre, in which the Panel found a violation of Art. I, § 22. As discussed, due process is lacking in this instance at each and every stage of the revised rate process, including judicial review. There is no hearing prior to the issuance of the revised rate order, except for the hearing provided at the early base load order stage. Moreover, as we have argued above, written comments do not serve as a substitute for a hearing. Further, prudence may not be challenged as to revised rates. In essence, the ratepayer is virtually shut out of the process, virtually helpless to contest the revised rate increases.

In short, as found with respect to the matter in McIntyre, and as argued above regarding the BLRA, §§ 58-33-285 and -287(B), along with § 58-33-275, place severe restrictions upon the



ratepayers' right to challenge revised rates. These restrictions themselves ensure that the ratepayers do not receive a "meaningful hearing at some stage" of the revised rates process. To the contrary, ratepayers do not receive a meaningful hearing at any stage of the revised rates process.

Further, contrary to arguments otherwise, Art I, § 22 does not require that an individual must possess a "property" or "liberty" interest in order to prevail under that constitutional provision (referencing S.C. Ambulatory Surgery Center Assn. v. S.C. Workers Comp. Comm., 389 S.C. 380, 699 S.E.2d 146 (2010) in support of this argument). Such a conclusion that a property right is necessary is inconsistent with the Court's earlier cases. Our Court has long interpreted Art. I, § 22 as an additional due process protection. Garris v. Governing Bd. of S.C. Reinsurance Facility, 333 S.C. 431, 444, 511 S.E.2d 48, 54 (1998); see also Stono River Environmental Protection Assn. v. S.C. DHEC, 309 S.C. 90, 94, 406 S.E.2d 340, 342 (1991) [Pursuant to Art. I, § 22, the parties "were entitled to notice and the opportunity to be heard."]. Indeed, the text of Art. I, § 22 nowhere mentions "liberty" or "property," but only "private rights." Moreover, Ambulatory Surgery Center is readily distinguishable. The Court there pointed out that, unlike here, utility regulation was not involved. In addition, a mere desire for future work, as in Ambulatory Surgery, was nothing more than an abstract need or a "unilateral expectation" rather than a "private right" for purposes of Art. I, § 22.

In contrast to the Ambulatory Surgery case, our Supreme Court has held that a utility ratepayer or consumer does have a right "to challenge a rate schedule as being excessive. . . ." Mims v. Edgefield Co. Water and Sewer Authority, 278 S.C. 554, 555, 299 S.E.2d 484, 485 (1983). In other words, a utility customer, desiring to challenge an excessive utility rate, has standing, based upon his or her economic interest, to do so. In Ambulatory Surgery, however,

the surgery centers possessed no “private right that warrant the protections provided in Article I, Section 22.” 389 S.C. at 392, 699 S.E.2d at 153. Here, ratepayers are substantially prejudiced by the lack of a right to an adequate and meaningful hearing to the ratepayers. See Porter v. S.C. Pub. Serv. Comm., 338 S.C. at 170, 525 S.E.2d at 869. Thus, the economic injury which revised rate increases inflicts is obvious. In the case of V.C. Summer, the injury imposed upon SCE&G customers is all too obvious. Porter emphasized that “rate increases ordered . . . in violation of due process” place a financial burden on consumers, sufficient to infringe Art. I, § 22. That financial burden in this case is well documented. Thus, here, as in McIntyre, there is a sufficient “private interest” to invoke the protections of Art. I, § 22. That requirement is what is necessary to trigger Art. I, § 22, not the requirement of a “liberty” or “property” interest, as is the case with the federal Constitution’s Due Process Clause.

The Base Load Review Act’s revised rates process thus slams the door on ratepayers continuously and allows the utility to raise revised rates repeatedly, all without sufficient due process. As our Supreme Court recognized in Ross v. Med. Univ. of S.C., 328 S.C. at 69, 492 S.E.2d at 72 (1997), “Art. I, § 22 requires notice and an opportunity to be heard prior to the [administrative] agency’s final decision.” With respect to revised rates, the PSC’s “final decision” occurs pursuant to § 58-33-280. See § 58-33-280(H) [granting of revised rates order requires utility to “provide notice to its customers with the next billing.”]. Yet, pursuant to § 58-33-280, even “parties of record” may only challenge revised rates through “written comments.” Written comments cannot replace an actual hearing.

Users of electricity are “captive payors.” Johnson v. Piedmont Mun. Power Agency, 277 S.C. 345, 362, 287 S.E.2d 476, 485 (1982) (Littlejohn and Gregory, JJ, dissenting). Here, the BLRA did not permit ratepayers to intervene in the § 58-33-280 revised rates proceedings and to

challenge the rate increase until after the rate increase had been approved. Written comments, with nothing more, provide ratepayers no right to appeal the revised rate increase ordered, pursuant to § 58-33-310. In short, there is no hearing whatsoever prior to a final rate order under § 58-33-280. The only hearing granted ratepayers on the front end is the hearing given customers before any costs are ever incurred by the utility. Such absence of a hearing for subsequent rate increases violates Art. I, § 22 and due process. Ross, supra; compare State ex rel. KCP&L Greater Mo. Operations Co. v. Mo. PSC, 408 S.W.3d 153, 167 (Mo. App. 2013) [Where “notice reasonably apprise[s] ratepayers of . . . rate increases and the public hearings reasonably afford ratepayers with the opportunity to be heard with regard to the proposed rate increases . . . the constitutional requirements of due process [are] satisfied. . . .”]; Smith & Smith v. S.C. PSC, 271 S.C. 405, 247 S.E.2d 677 (1978) [due process requires a hearing prior to approval of a transfer order by PSC]; Utilities Services of S.C., Inc. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 110, 708 S.E.2d 755, 763 (2011) [non-party customers “are entitled to voice an objection to proposed rates by providing sworn testimony at a public hearing. . . .”] (emphasis added); Barasch v. Pa. Pub. Util. Comm., 546 A.2d 1296, 1306 (Pa. 1998) [written comments do not provide customers sufficient due process; “customers must be provided with notice of the proceedings and an opportunity to be heard to challenge the proposed action.”].

The “‘root requirement’” of due process is that a person “‘be given the opportunity for a hearing before he is deprived’” of property or, in this case, his or her “‘private interest.’” Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985). “Affected customers” are entitled to an opportunity to be heard prior to a rate increase. Porter, supra. The BLRA fails woefully. Thus, SCE&G ratepayers were deprived of their constitutional rights of due process through enforcement of the BLRA.

Such a lack of procedure was present in Barasch v. Pa. Util. Comm., supra, and was declared constitutionally invalid. There also, notice by publication was combined with the submission of “written comments” by ratepayers. In the Court’s view, “such a procedure would needlessly postpone the customers’ opportunity to challenge the proposed action until after the Commission had formulated a decision as to the matter and had a stake in preserving that decision.” This is precisely the situation in the case at hand. In Barasch, the Court held:

[i]n our view, due process requires that, before the PUC may issue a declaration approving the legality of the terms and conditions of a contract for a utility’s purchase of power from a QF that includes payments for capacity, the utility’s customers must be provided with notice of the proceeding and an opportunity to challenge the proposed action.

546 A.2d at 1306. See also Cribb v. S.C. Dept. of Health and Human Services, 2011 WL 7119226 (Adm. Dec. 6, 2011) at \* 4 [“The city’s procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus, a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures.”] (citing Goldberg).

So too here. It does little good in this instance to allow the submission of a few written comments (by those who happened to hear about the proposed revised rate increase through newspaper publication), yet affording notice and an opportunity to be heard only after the revised rate increase has gone into effect. That is not the procedural due process which Art. I, § 22 of the Constitution envisions or requires for SCE&G ratepayers.

In Brown v. S.C. State Bd. of Ed., 301 S.C. 326, 328-29, 391 S.E.2d 866, 867-68 (1990), the Supreme Court addressed a situation similar to those constitutional flaws contained in § 58-33-280. Brown involved the requirements of a teaching certificate and a determination of the

process that was due. At issue, was the validity of a regulation alleged as violative of procedural due process pursuant to the 14th Amendment and Art. I, § 22. The Court noted that “[t]he State must afford notice and the opportunity for a hearing appropriate to the nature of the case.” According to the Supreme Court, in Brown,

[w]e hold Reg. 43-59 unconstitutional because it does not provide for notice and an opportunity to be heard when the State deprives a teacher of his or her teaching certificate. The fact that appellant was granted a hearing as a matter of favor in this case does not save the regulation from constitutional attack under the Due Process Clause. Coe v. Armour Fertilizer Works, 237 U.S. 413, 35 S.Ct. 625, 59 L.Ed. 1027 (1915). Further, the hearing appellant was granted did not comport with procedural due process since the Board did not disclose any evidence substantiating cancellation of the NTE scores in order to allow appellant the opportunity to contest the allegations against her.

As can be seen, the fact that the Board of Education in Brown had granted a hearing gratuitously did not serve to cure the regulation’s lack of provision for notice and a hearing. Similarly, § 58-33-280, providing for no notice or meaningful opportunity to be heard within the statute’s four corners, is fatal to its unconstitutionality. By authorizing SCE&G ratepayers to provide only “written comments” pursuant to notice by publication before the revised rate increase, and by requiring a customer to intervene in a “new” proceeding after the increase has been approved in order to challenge that increase, violates the ratepayer’s right to due process. Porter clearly mandates that, prior to a rate increase, notice and an opportunity to be heard must be given to ratepayers.

The South Carolina Supreme Court’s decision in Smith & Smith v. South Carolina Public Serv. Comm., 271 S.C. 405, 407, 247 S.E.2d 677, 678 (1978) is also instructive as to the necessity of a hearing prior to adverse action being taken by the PSC. There, an action was brought to vacate orders of the PSC approving certain Certificates of Public Convenience and Necessity. The Commission had approved the orders regarding trucking companies “[w]ithout

notice or a hearing.” The respondents had requested a hearing, which was denied by the Commission, which chose to rely upon a PSC regulation allowing certificates to be issued without notice and a hearing. The Supreme Court affirmed the trial court’s order setting aside the issuance of the transfer certificates and remanding to the PSC. According to the Court,

[t]he trial court properly set aside the Commission’s orders and remanded the matter for a hearing. We hold that prior to approving a transfer application, the Commission must give public notice of the proposed transfer. Following receipt of a protest to the proposed transfer, the Commission shall conduct a public hearing.

271 S.C. at 406, 247 S.E.2d at 678 (emphasis added). The Court went on to explain its conclusion as follows:

[w]e recognize the wide amount of discretion vested in the Public Service Commission by the legislature. However, in order to insure the wise application of the Commission's authority, a full hearing, where the true facts surrounding the proposed transfers are revealed, is essential. See 2 Am.Jur.2d, Administrative Law, Section 397. In Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937), Justice Cardozo observed:

“All the more insistent is the need, when power has been bestowed so freely, that the ‘inexorable safeguard’ . . . of a fair and open hearing be maintained in its integrity . . . The right to such a hearing is one of ‘the rudiments of fair play’ . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement.” 301 U.S. at 304-305. 57 S.Ct. at 730.

The Commission's discretion does not extend to making unilateral determinations of the necessity of affording notice. Considerations of due process require that notice be given in every instance prior to approval of a transfer by the Commission. In the event such notice provokes a protest, the Commission must afford all parties an opportunity to be heard at a public hearing.

A transfer is essentially a granting of the certificate in the first instance, and the interests considered in the original application should be considered in a transfer. The Commission’s procedure here effectively circumvented the entire theory of a regulated industry. It is arbitrary to grant hearings in one case where material rights are potentially affected, and then deny such safeguards in cases involving similar rights. Consolidated Freightways, Inc.

v. United Truck Lines, Inc., 216 Or. 515, 330 P.2d 522 (1958), Cert. Denied, 359 U.S. 1001, 79 S.Ct. 1136, 3 L.Ed.2d 1029 (1959).

271 S.C. at 407, 247 S.E.2d at 678. Thus, Smith and Smith held that the rule which the Commission relied upon could not lend legality “to the denial of notice and right to be heard to these respondents.” 271 S.C. at 408, 247 S.C.2d at 678.

Furthermore, there is no doubt that SCE&G ratepayers were substantially prejudiced by the insufficient notice to customers and the lack of an opportunity to be heard. Nine rate increases occurred as a result of the defective notice, as well as the lack of an opportunity of customers to be heard with respect to revised rates. The Commission may take notice that this amounted to approximately an 18% increase to ratepayers. See Op. S.C. Att’y Gen., 2018 WL 2173948 (May 2, 2018) [House version of S.954 of 2018 sets an experimental rate at “0,” representing an 18% reduction in revised rates]. As the Supreme Court stated in Porter, while “there is no way to determine actual prejudice in the amount of the rate increases ordered, the public was completely deprived of the opportunity to be heard.” 338 S.C. at 170, 525 S.E.2d at 869. Given the fact that Porter expressly states that utility rate increases “are of primary concern to the public and the essential reason for requiring notice,” it is clear that SCE&G ratepayers were substantially prejudiced by the insufficient notice they were provided, as well as the absence of a meaningful opportunity to be heard that they were given, with respect to revised rates.

As the United States Supreme Court has observed, “. . . stockholders are not the only persons whose rights or interest are to be considered. The rights of the public are not to be ignored.” Smyth v. Ames, 169 U.S. 466, 545 (1898). The lack of due process provided by § 58-33-280 and § 58-33-285, places a difficult, if not impossible, burden upon SCE&G ratepayers.

Thus, Art. I, § 22 is violated as applied to SCE&G ratepayers by the aforementioned provisions of the BLRA.

Moreover, Art. IX, § 1 of the State Constitution requires that ratepayers be treated fairly. Any rate increase or burden placed upon customers must be just and reasonable. See Southern Bell v. S.C. Pub. Serv. Comm., 270 S.C. 590, 595, 244 S.E.2d 278, 281 (1978) (citing Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm. of West Va., 262 U.S. 679 (1923) and Fed. Power Comm v. Hope Nat. Gas. Co., 321 U.S. 591, 603 (1944); see also Mims v. Edgefield Co. Water & Sewer Co., *supra* [rates cannot be “unduly burdensome” upon consumers]; Jersey Cent. Power & Light Co. v. FERC, 810 F.2d 1168, 1190 (D.C. Cir. 1987) (Starr, J. concurring) [determination of prudence and used and useful principles safeguard ratepayers to ensure their property is not “taken” by saddling them “with the results of management’s defalcations or mistakes” or “as a matter of simple justice be required to pay for that which provides the ratepayers with no discernible benefit.”]. That is precisely what the BLRA does. The Act was clearly drafted for the benefit of the utility and its investors. The BLRA is ratepayers’ worst nightmare. As such, the BLRA does not regulate public utilities “in a manner consistent with the public interest,” as the Commission has concluded it must, in order to meet the requirements of Art. IX, § 1 of the Constitution. In Re Carolina Water Serv., 2007 WL 4944726 (Nov. 219, 2007).

#### **Remedy for Violation of Ratepayers’ Constitutional Rights**

As our Supreme Court has recognized, a ruling of unconstitutionality of a statute generally “means the statute is void ab initio, absent special circumstances.” Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 398, 596 S.E.2d 42, 47 (2004). Given, however, the fact that, as discussed above, the PSC, as an administrative agency, possesses no authority to



declare the BLRA void ab initio, but only to conclude that the BLRA is unconstitutional as applied to SCE&G ratepayers, any remedy fashioned by the PSC must be based upon “special circumstances.” Bergstrom, id.

In Bergstrom, the Supreme Court noted previous case law which had fashioned a special remedy for the unconstitutionality of a statute. According to the Court,

. . . we also have recognized the necessity of upholding the validity of transactions or events that occurred before a statute was declared unconstitutional. See Knotts [v. S.C. DNR], 348 S.C. at 11, 558 S.E.2d at 516 (while statute allowing members of legislative branch to oversee spending of funds was an unconstitutional violation of separation of powers and void in its entirety, executive branch agency would still be allowed to fulfill its proviso obligations under recent appropriations act); O’Shields v. Caldwell, 207 S.C. 194, 224, 35 S.E.2d 184, 196 (1945) (a public officer charged with disbursing funds usually is not liable for paying out public money when directed to do so by statute even when the statute is later found unconstitutional, unless officer acted fraudulently or in bad faith) (Oxner, J. dissenting in part. . . .; Herndon [v. Moore], 18 S.C. at 352-358 (applying exceptional doctrine of communis error facit jus – “common error makes right” to hold the great number of sales involving thousands of acres of property during ten-year period by probate courts were later determined not to have subject matter jurisdiction to conduct such sales because statute purporting to grant such jurisdiction was unconstitutional.

358 S.C. at 399-400, 596 S.E.2d at 47-48. See also State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 304, 223 S.E.2d 166, 179 (1975) [concluding that various statutes establishing different courts violated Art. V of the South Carolina Constitution, but that “these courts, and the judges serving them, were also de facto and that their final judgments, decrees, sentences, and actions are binding on the parties involved and on the public and are not subject to collateral attack.”].

Herndon v. Moore, *supra*, cited with approval in Bergstrom, discussed at length the doctrine of communis error facit jus. The South Carolina Supreme Court stated the following:

. . . rights acquired under an act having the form of law, are sustained, although the act be afterwards declared unconstitutional upon the principle

involved in the maxim communis error facit jus. This proceeds upon the view that to annul everything done under an act solemnly passed by the lawmaking power of the State, generally received as valid and so expounded and administered by courts of justice, would operate as a fraud upon the parties thus misled. . . .

Perhaps the leading case upon the subject in this country is that of Gelpecke v. City of Dubuque, 1 Wall. 175. It appears in that case that the legislature of Iowa passed a law authorizing the City of Dubuque to aid in the construction of a certain railroad by issuing bonds in pursuance of a vote of the city. The Supreme Court of the State decided that a legislature had the right to authorize municipal corporations to subscribe to railroads extending beyond the limits of the city or county, and to issue bonds accordingly. During the time the law was thus expounded, bonds were issued upon the faith of it. Afterwards, the Supreme Court of the State decided that the legislature had no such power. It was held by the Supreme Court of the United States that the latest decision, declaring the act unconstitutional, did not affect rights which had been acquired before its rendition, thus giving the judgment the effect only of the repeal of a valid law. In delivering the judgment of the court, Mr. Justice Swayne said: "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. The sound and true rule is that if the contract, when made, was valid by the law of the State, as then expounded by all departments of the government, and administered in the courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the state, or decisions of its courts altering the construction of the law." Ohio Life and Trust Co. v. Debolt, 16 How. 432.

The same principle applies where there is a change of judicial decisions as to the constitutional power of the legislature to enact the law. It rests upon the plainest principles of justice. "To hold otherwise would be a unjust as to hold that rights acquired under a statute maybe lost by its repeal." This principle has been incidentally recognized in our state on the Bond Debt Cases, 125 S.C. 282 and also in the case, State ex rel. Brown v. C&L R.R. Co., 13 S.C. 291. In the Bond Debt Cases, Mr. Justice McIver, in delivering the judgment of the Court said: This rule was again affirmed in the case of Lee Co. v. Rogers, 7 Wall. 181, and the question was there said not to be open for re-examination in the Supreme Court of the United States. It is perfectly manifest, therefore, that even were we to overrule the case of Morton Bliss & Co. v. The Comptroller General, it would not help the case of the State, in view of the rule thus firmly established whether correctly or not we are called upon to say) in the tribunal of last resort.

18 S.C. at 354-56.

We believe these authorities are particularly instructive in this instance. We do not doubt the good faith of the General Assembly in enacting the BLRA in 2007. The Act was passed in the face of an energy crisis, and it was thought the BLRA could help facilitate resolution of that crisis. Moreover, in our view, the statute was fully carried out pursuant to its terms by the ORS and by this Commission. The Supreme Court had before it the BLRA on three separate occasions and dutifully interpreted the law as the General Assembly wrote it. The Court interpreted the Act with the underlying purpose that the legislation was intended to allow a utility, such as SCE&G, to recoup costs on the front end (“advanced costs”), rather than at the end of the process, as is usually the case in utility regulation. See Friends of the Earth v. Public Service Commission of South Carolina, 387 S.C. 380, 692 S.E.2d 910 (2010); South Carolina Energy Users Comm. v. South Carolina Electric and Gas, 388 S.C. 486, 697 S.E.2d 587 (2010); South Carolina Energy Users Comm. v. South Carolina Electric and Gas, 410 S.C. 348, 764 S.E.2d 913 (2014). Unfortunately, as we have pointed out, by foreclosing prudence challenges, the BLRA allowed waste and imprudence to reign supreme.

In the accompanying Joint Resolution to Act 258 (Act 271), the General Assembly expressly determined that “. . . the rates that the SCANA customers are currently paying are unjust and unreasonable. . . .” According to the Joint Resolution, “serious questions have arisen regarding the prudence of incurred costs that have led to rate increases pursuant to the BLRA for the abandoned project. . . .”

In the 2014 Energy Users case, for example, the Supreme Court referenced 58-33-275(A) of the BLRA, which deems the base load review order as “final and binding determination that a plant is used and useful” and that “capital costs are prudent” so long as the

plant is being constructed within the parameters of the approved schedules and cost estimates.

The Court noted:

[p]ractically speaking, it would be nonsensical to include such a [prudency] requirement at this stage. As the Commission aptly noted,

[T]he BLRA was intended to cure a specific problem under the prior statutory and regulatory structure. Before adoption of the BLRA a utility's decision to build a base load generating plant was subject to relitigation if parties brought prudency challenges after the utility had committed to major construction work on the plant. The possibility of prudency challenges while construction was underway increased the risks of these projects as well as the costs and difficult of financing them. In response, the General Assembly sought to mitigate such uncertainty by providing for a comprehensive, fully litigated and binding prudency review before construction of a base load generating facility begins. The BLRA order related to [the initial base load review order], is the result of such a process. It involved weeks of hearings, over 20 witnesses, a transcript that is more than a thousand pages long and rulings that have been the subject of two appeals to the South Carolina Supreme Court.

410 S.C. at 359, 764 S.E.2d at 918-19. While the Court was certainly correct that this was the purpose of the BLRA, and this may have been desirable in theory, in hindsight, the result turned out to be a debacle. The unconstitutionality of the Act served as a major contributing factor.

In light of this debacle, the General Assembly, in Act No. 258 of 2018, has appropriately repealed the BLRA going forward. Section 2 of the Act (§ 58-33-220) states:

- A. [a]s of the effective date of this act, the Public Service Commission must not accept a base load review application, nor may it consider any requests made pursuant to Article 4, Chapter 33, Title 58 other than in a docket currently pending before the commission.
- B. The provisions of Article 4, Chapter 33, Title 58 are repealed upon the conclusion of litigation concerning the abandonment of V.C. Summer Units 2 and 3.

Act 258 also substantially altered the BLRA as it relates to the matters before this Commission. Prudency was specifically defined, as was imprudency. And, importantly,

customers were provided a substantial reduction in BLRA rates on an experimental basis. The General Assembly instructed this Commission to establish a permanent rate by December 21.

All of these factors point to the Lightsey Settlement Agreement as an appropriate remedy for the constitutional violations imposed upon ratepayers by the BLRA. The Lightsey Settlement Agreement proposes a permanent rate slightly below the experimental rate set by Act 258. Moreover, it gives ratepayers substantial monetary relief (upwards of 200 million dollars) in addition to a rate below the experimental rate.

Accordingly, we believe the Lightsey Settlement Agreement affords a suitable remedy for the violations of ratepayers' constitutional rights inflicted by the BLRA. In re Carolina Water Service, Inc., 2006-92-WS, 2007 WL 4944726 (Nov. 19, 2007), a decision of this Commission, quoted Art. IX, § 1 of the South Carolina Constitution as requiring the General Assembly to regulate public utilities in the "public interest." There, the Commission emphasized that, therefore,

. . . all regulation of public utilities must be conducted in a manner consistent with the public interest. The State Supreme Court has recognized this provision (Art. IX, § 1) as the underlying basis of the PSC's authority to regulate public utilities. Duke Power Co. v. S.C. Pub. Serv. Comm., 284 S.C. 81, 88, 326 S.E.2d 395, 399 (1985). The Commission's determination of whether a proposed rate [increase or decrease] is just and reasonable is consistent with this mandate.

### CONCLUSION

The BLRA is the ratepayer's worst nightmare. It allows no due process to SCE&G customers and strips them of the ability to challenge prudence. The one-sidedness of the Act makes it in violation of Art. IX, § 1 because the statute serves the investor's interest, not that of the public.

That said, in our view, the Lightsey Settlement Agreement provides an appropriate remedy for the violations of ratepayers' constitutional rights set forth herein. The Lightsey Settlement Agreement affords a just and reasonable rate to ratepayers, and provides customers substantial direct relief for constitutional wrongs. Thus, we believe the rate proposed by Dominion as part of that Lightsey Settlement Agreement is in the public interest, consistent with Art. IX, § 1.

Respectfully submitted,

ALAN WILSON  
Attorney General

ROBERT D. COOK  
Solicitor General  
S.C. Bar. No. 1373

J. EMORY SMITH, JR.  
Deputy Solicitor General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3680  
S.C. Bar No. 5262

BY:



ATTORNEYS FOR THE  
STATE OF SOUTH CAROLINA EX REL.  
ALAN WILSON, ATTORNEY GENERAL

December 7, 2018